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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH P. McCOMBS, Chairman,
Illinois Prisoner Review Board,

Petitioner,

vs.

WILLIAM SCOTT,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines to find a legitimate expectation of release on parole where the Illinois parole statute contains no mandatory language limiting the Illinois Prisoner Review Board's broad discretion to deny parole and where Illinois courts have squarely held that parole under the statute is a matter of executive grace and clemency.

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ARGUMENT

I.

A *DE MINIMIS* APPROACH TO THIS PETITION IS PARTICULARLY INAPPROPRIATE IN VIEW OF THE RESPONDENT'S INABILITY TO OFFER ANY FEDERAL CASE LAW SUPPORTING A FINDING OF AN EXPECTATION OF PAROLE RELEASE IN A STATUTE WHICH IS FOUND TO BE AMENABLE TO A READING THAT DOES NOT CREATE AN EXPECTATION OF RELEASE AND WHICH HAS NEVER BEEN SEEN AS CREATING AN EXPECTATION OF RELEASE BY THE STATE COURTS CHARGED WITH INTERPRETING IT OR THE ADMINISTRATIVE AGENCY CHARGED WITH ENFORCING IT.

In the Petition for Writ of Certiorari, the petitioner has contended that the United States Court of Appeals for the Seventh Circuit impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines to find a legitimate expectation of release on parole where the Illinois scheme of parole contains nothing which limits the Illinois Prisoner Review Board's broad discretion to deny parole and where Illinois courts have consistently and squarely held that parole under the statute is a matter of executive grace and clemency. The respondent has answered with a *de minimis* argument which addresses neither the conflict with the state courts nor the conflict with the rationale underlying due process analyses consistently relied on by this Court and other circuit courts of appeals.

The response to the Petition for Writ of Certiorari argues that the Seventh Circuit merely determined that there was a legitimate expectation of release under the Illinois parole scheme "if Illinois prisoners met the conditions for parole." Response at 1. The respondent then

contends that this analysis is entirely consistent with this Court's decision in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and its progeny. The respondent avoids attempting to set forth *any* precedent for finding a protected liberty interest in a parole scheme which vests total discretion in denying parole in the, heretofore, unreviewable discretion of the state parole authority. The respondent also fails to point to any provision of Illinois law which mandates that an inmate must be released if some "conditions of parole" are met. To find those "conditions," the respondent resorted to a lengthy analysis of a 1979 set of ever-changing administrative guidelines, but then fails to even suggest that the guidelines have some binding effect on the day-to-day decisions of the board.

The Illinois General Assembly created a parole authority in the mid-nineteenth century and gave that parole authority full discretion in the decision to grant or deny parole. *See George v. The People*, 169 Ill. 447 (1897). From time-to-time the General Assembly has modified the procedures and factors for consideration in reaching the parole decision. *See People v. Kinney*, 30 Ill.2d 201, 195 N.E.2d 651 (1964). In 1972, largely because of concerns over the federal courts' meddling in what the General Assembly considered to be a state legislative realm, the parole statute was changed to limit the parole authority's ability to *grant* parole under certain circumstances. Petition for Writ of Certiorari at 18-20.

Contrary to the respondent's position, logic dictates that limiting the ability to grant parole while leaving intact unbridled discretion to deny parole *decreases* the potential for a reasonable expectation of release.

At least two of the five Illinois Appellate Court districts have looked at the Illinois parole scheme and

relied on *Greenholtz* to determine that no expectation of release on parole exists in Illinois. *See People ex rel. Harris v. Irving*, 90 Ill. App. 3d 56, 60, 412 N.E.2d 976 (5th Dist. 1980); *People ex rel. Burbank v. Irving*, 108 Ill. App. 3d 697, 702, 439 N.E.2d 554 (3rd Dist. 1982). In *Burbank*, the Court noted that, "In Illinois, the mere existence of a system for paroling prisoners does not transform parole into a legal right [citing to *Greenholtz*] . . . . The decision to modify the prisoner's status lies within the largely unreviewable discretion of the Prisoner Review Board." *People ex rel. Burbank v. Irving*, 108 Ill. App. 3d at 702, 439 N.E.2d at 557.

The decision in *Burbank*, entered several months after the Seventh Circuit published the opinion in *Scott*, once again clearly reaffirms the Illinois courts' view that the Illinois scheme of parole does not create an expectation of release on parole and leaves the federal courts in Illinois as the only forums which apparently recognize these two thousand inmates' claims regarding parole denial.

The respondent's only attempt to distinguish ninety years of Illinois caselaw is by asserting that no Illinois court has ever said that it considered the rules and regulations of the parole authority. The petitioner answers this claim with the observation that the Seventh Circuit also failed to fully consider the "rules and regulations." The petitioner respectfully suggests that rules of an administrative agency can not be considered in a vacuum.

To this day, the parties have no idea which edition of the Rules Governing Parole was relied on by the Seventh Circuit. Moreover, the court of appeals made no inquiry into the finality or authority of the rules in the eyes of the Board or the frequency or effect of changes in those rules. Clearly, if the Board believed the rules relied on so heavily by the respondent and the Seventh

Circuit to be anything more than a guide then how does the respondent explain parole denials for being "an habitual offender." (*See Appendix M, Petition for Writ of Certiorari*)[1]

Finally, the respondent's citation to *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982), *cert. denied*, No. 81-2105 (October 12, 1982), for the proposition that due process rights existed prior to 1973 when analyzed in light of *Greenholtz* is particularly misguided. The citation to *Greenholtz* in *Welsh* refers to an admission by the State on a question that was not in issue. Clearly, the pre-1973 Illinois statute, which contains none of the language relied on in *Scott*, creates no expectation of release on parole. *See Ill. Rev. Stat.*, 1969, ch. 108, § 203 *et seq.*

Welsh is important, on the other hand, because the court's consideration of the constitutionality of the 1973 parole statute in relation to its application to an inmate convicted of a 1969 offense in *Scott* is wholly irreconcilable with *Welsh* and unexplainable in view of *Welsh*. The petitioner notes that the respondent did not even hazard any attempt at an explanation for this conflict in his response.

The decision of the Seventh Circuit in this case directly conflicts with the reasoning underlying *Greenholtz*, an unbroken line of Illinois caselaw, the intent of the Illinois legislature, and the Seventh Circuit's own decision in *Welsh*. This Court should allow the Petition for Writ

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[1] The respondent's assertion that the Board has used a checklist for denial notices since 1978 is partially correct. This is because the majority of inmates have been found to be affected by these criteria in some way. Nonetheless, where the Board wishes to deny parole for a reason other than those listed it merely checks the box referring the inmate to an addendum and appends an explanation of the reason. *See* attached *Appendix O at 1a.*

of Certiorari and allow the People of the State of Illinois an opportunity to challenge this costly and unjust decision.

II.

THE PROCEDURAL HISTORY OF THIS CASE MORE THAN JUSTIFIES THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS TO CORRECT THIS COSTLY AND UNJUST DECISION.

The most distressingly misleading portion of the response is that directed to the procedural history of this case.

The Seventh Circuit first found due process interests arising from the present form of the Illinois parole statute in *United States of America ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976). The *Richerson* decision relied on an analysis that found a constitutionally protected interest to be present if the State held out the mere possibility of parole. That analysis was, as the Seventh Circuit noted in this case, "specifically rejected" by this Court in *Greenholtz. United States of America ex rel. Scott v. Illinois Parole and Pardon Bd.*, 669 F.2d 1185 at 1187.

Immediately following the *Greenholtz* decision, the Seventh Circuit and the United States District Courts in Illinois began uniformly denying habeas corpus petitions in light of analyses conducted pursuant to *Greenholtz*. The Seventh Circuit's opinions in this regard were short, plain and consistent. The lone exception to the consistency was the decision in *Newbury v. Irving*, No. 80-2352 (7th Cir. July 23, 1981).

The Illinois Attorney General could not participate in *Newbury* because the action was a proceeding under 42 U.S.C. § 1983 against an individual. In Illinois, the At-

torney General is prohibited by statute from representing individual defendants in such cases until a formal request for representation has been made by the party and then approved. *Ill. Rev. Stat.*, 1981, ch. 127, § 1302. Because *Newbury* was denied leave to proceed in the district court and, therefore, the defendant was not actually made a party to the action, it was not possible for the Attorney General to have represented him.

Moreover, in the *Burns* decision several months after *Newbury*, the court considered an *identical* claim in a 28 U.S.C. § 2254 context and summarily affirmed the district court's *sua sponte* dismissal of the petition as frivolous. *Burns v. Irving*, No. 80-1429 (7th Cir. December 8, 1981). The respondent's argument that *Newbury* somehow "signaled" *Scott* is creative, but frivolous nonetheless, in view of the strong, clear language of *Burns* and the fact that Judge Sprecher was a member of the panel in both cases.[2]

Nonetheless, the respondent stands firm on the incredible argument that unpublished orders of the Seventh Circuit have *no* precedential value whatsoever. The respondent's argument reduces Circuit Rule 35 to the absurd. Circuit Rule 35(c)(1)(i) tells litigants that an opinion *will* be published if it changes an existing rule of law. When the district court dismisses a Section 2254

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[2] The respondent has also argued, in a footnote, that the petitioner has not fairly characterized the issue in *United States of America ex rel. Parisie v. Irving*, No. 80-1240 (7th Cir. July 8, 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 168 (1980). Contrary to the respondent's unexplainable representation, leave to proceed *in forma pauperis* was denied in *Parisie* because the action was frivolous. Had the district court merely found that the petitioner had sufficient funds to initiate the action, it would have denied leave to proceed *in forma pauperis* on that stated ground and would not have had to consider the potential merit of the claim to deny leave to proceed.

petition for failure to state a constitutional claim on the basis of *Greenholtz* and is affirmed by the Seventh Circuit in an order, which by its very form, tells the parties that the position is consistent with the existing rule of law in the circuit, then the parties to that action *must* have a right to rely on that decision in determining their future course of conduct. Federal courts have no right to impose whimsical decisions on state administrative agencies which are constantly struggling to adjust their conduct to protect the constitutional rights of the people with whom they deal.

The decisions in all of the unpublished pre-*Scott* orders were consistent and straightforward in relying on *Greenholtz* to tell Illinois inmates that they had no protected liberty interest under the Illinois parole scheme.

The sanctimonious suggestion by the respondent, from within the confines of the idealistic environs of the university, that the Illinois Attorney General should "prepare and file his best brief" in every *pro se* appeal from a dismissal of a frivolous Section 2254 claim demonstrates a marked lack of understanding of the realities of the practice of public law.[3] Indeed, the realities of appellate practice itself mandate that counsel not "puff" briefs by arguing settled questions.[4] These realities are

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[3] In Illinois, fourteen assistant attorneys general are charged with the primary responsibility for *all* criminal cases in the Illinois Supreme Court, *all* Illinois criminal cases in this Court, and *all* federal habeas proceedings on all levels.

[4] The *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit*, 1981 ed., which is distributed by the Clerk of the Seventh Circuit instructs practitioners that

> "The brief writer should never forget that the judges are reading the briefs in six cases in preparation for each day of oral argument. The writer must select what is important and deal only with that; all that is not necessary should be ruthlessly discarded." *Id.*, at 42.

made even bleaker by sweeping decisions, such as this, which stretch the imagination to create more than two thousand federal causes of action which are theoretically capable of annual repetition for several years but which are not cognizable in the state courts.

In view of the procedural history of this case, this Court should grant the Petition for Writ of Certiorari in order to remove the court of appeals from the advocate's role and to allow the People of the State of Illinois to be heard. In the alternative, this Court should defer to the unbroken line of Illinois case law and summarily reverse the Seventh Circuit's opinion which, effectively, destroys the considerations underlying this Court's decision in *Greenholtz*, and which directly conflicts with the unanimous position of the state courts on a question involving the construction of a state statute.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

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APPENDIX O

Name: William Heirens
No. C-06103

Inst. Vienna
Dkt. No. _____

STATE OF ILLINOIS
PRISONER REVIEW BOARD

Date Aug. 16, 1982

To the Warden—
The following order is your authority to release this individual on parole to the custody and supervision of the Office of Community Supervision, or continue to hold as indicated. If parole is ordered, said order is subject to being vacated prior to release to parole. Any release is contingent upon execution of Parole or Mandatory Supervised Release Agreement.

- ☐ Parole granted effective when
  - ☐ Parole plans are approved
  - ☐ Minimum is served
  - ☐ Eligible
- ☐ Subject to regular conditions and
  - ☐ Close Supervision
  - ☐ Special Condition No. _____
  - ☐ Recommendation No. _____
- ☒ Parole denied, continued to June 1983
- ☐ Hearing continued to _____
  - ☐ Psychiatric Report requested
  - ☐ For verification of parole plans
  - ☐ At inmate's request
- ☐ Release date offer addended to this Order

_____

☐ Declared a violator as of

_____ on

☐ Statutory Parole
☐ Mandatory Supervised Release
☐ Parole

☐ Parole or release revoked

☐ Continued to _____

_____

☐ Parole or release continued

☐ Effective _____

_____

☐ Effective when plans are approved

☐ Found not to be a violator

☐ Hearing continued to _____

☐ For further information
☐ At inmate's request
☐ For Violation Report
☐ Recommendation No. _____
☐ Special Condition No. _____

_____

☐ Order of _____

☐ Amended
☐ Stayed
☐ Vacated

☐ Warrant withheld

☐ Warrant withdrawal request

☐ Granted
☐ Denied

☐ Statutory Parole

☐ Release by statute

☐ Considering all factors of your case, it is the judgment of the Board that parole is warranted.

☒ See Addendum attached to and made a part of this Order

The Board, considering all factors in your case, is denying parole at this time because of one or more of the following statutory reasons:

☐ There is a substantial risk that you will not conform to the reasonable conditions of parole, based upon one or more of the following reasons:

- ☐ Existence of prior adult felony convictions.
- ☐ An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
- ☐ Prior adult parole or probation violations within five years prior to offense.
- ☐ Refusal to be supervised on parole.
- ☐ Inadequate parole plan.

☐ Your release would deprecate the seriousness of the offense or promote disrespect for the law, based upon one or more of the following factors:

- ☐ The offense for which you were convicted, _____
- ☐ The aggravating as well as mitigating circumstance as described by statute.

☐ Your release would have a substantially adverse effect on institutional discipline based upon one or more of the following factors as established by the finding of an Administrative Review Board:

- ☐ Physical attack on another inmate or institutional staff.
- ☐ Possession of weapons or drugs.
- ☐ Repeated violations of major institutional rules.
- ☐ Committed an act prohibited by law.

Violator Rationale

Parole or release is violated because you:

- ☐ Were convicted of (charged with) _____
  _____
- ☐ Violated condition(s) _____
  _____
  of your Parole or Release Agreement
- ☐ Violated condition(s) _____
  _____
  of your Special Order
- ☐ Absconded
- ☐ Possessed ☐ Delivered
  - ☐ A controlled substance
  - ☐ A weapon
- ☐ Did not comply with your counselor's instructions to
  _____
- ☐ Failed to report or falsified report(s)

Evidence Relied Upon

- ☐ Counselor's Report
- ☐ Police Report
- ☐ Testimony or reports of witnesses
- ☐ Own admission

☐ See Addendum attached to and made a part of this Order

For The Board

[Signatures omitted in printing.]

RATIONALE

August 16, 1982

William Heirens **Vienna C-06103**

The Board, having heard your case, reviewed the written material in your file which included a statement from the prosecutor, your institutional record, and the representation made by you at the hearing at Vienna Correctional Center.

In considering the crimes for which you are now serving time, the Board notes that you were convicted of three murders in which the bodies were dismembered. Furthermore, you stated that you obtained sexual satisfaction from committing these and other burglaries in which three of the victims were murdered.

This behavior was precipitated by unknown factors, thus rendering at best your behavior in an unstructured environment difficult to predict.

The Board in rendering its decision to deny parole considered all the above factors but feels there is a risk of further nonconforming conduct too great to allow your release at this time.

The foregoing rationale is substantially the same reasoning that led to the denial of your parole in 1979 and other recent years.

We take note of your excellent institutional adjustment in a structured environment and encourage you to continue in the same manner.
